

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	
NUMBER 76LJ-11583000 BY RAMONA S.)	FINAL
AND WILLIAM N. NESSLY)	ORDER

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on October 30, 2002. Objector Shoal and Objector Templeman filed timely exceptions to the Proposal and did not request an oral argument hearing. Applicant filed timely responses to the exceptions.

The Proposal recommended granting a Beneficial Water Use Permit to appropriate twelve gallons per minute up to 7.95 acre-feet of water per year for irrigation and stock purposes.

Objector Shoal took exception to: the lack of a condition requiring Applicant to meter the water being diverted at the point of diversion; to the lack of a clear statement that it is the Applicant's burden to contact downstream senior appropriators prior to diverting water; lack of a condition granting Objector Shoal inspection access to Applicant's diversion works; lack of a requirement to remove, or make inoperative, the second cistern at the point of diversion; lack of detailed system engineering drawings for the project. Objector Templeman took exception to: the lack of a condition requiring a project compliance inspection by a licensed engineer from the Kalispell Water Resources Regional Office; the lack of a condition requiring a flow meter at the secondary pump point of diversion; lack of a condition requiring the Applicant to keep written records of flows diverted from Lerch Creek; lack of a condition requiring the Applicant to install a measuring device below his point of diversion and above the downstream Objectors' points of diversion, and requiring that Applicant not divert unless 117 gallons per minute (gpm) are flowing in Lerch Creek at that point; and lack of a condition requiring Applicant to acknowledge the water rights of downstream appropriators and to honor a call from any of these rights.

Applicant's response to Objector Shoal's exceptions is: Applicant will provide annual reports of diversion flow rate, dates, and times to the local Water Resources Regional Office; there is no statutory or regulatory basis requiring Applicant to call downstream appropriators prior to diverting water; a suitable measuring device exists where Lerch Creek enters Objector Shoal's property, and unrestricted access to Applicant's point of diversion is unreasonable; removal of the lower cistern is not necessary because the pipe has been capped and the valve is closed; drawings and exhibits in the record meet the request for drawings; and, there is no statutory basis requiring Applicant to officially acknowledge downstream water rights.

Applicant's response to Objector Templeman's exceptions is: they have no objection to the first three exceptions of Objector Templeman; an existing culvert could be used as a measuring device, but the flow at the culvert should be 105 gpm, not 117 gpm; and there is no statutory basis for Objector Templeman's fifth condition to officially acknowledge downstream water rights.

In this review the Department may, pursuant to Mont. Code Ann. § 2-4-621(3) (1999) and Mont. Admin. R. 36.12.229 (1999), adopt the proposal for decision as the Department's Final Order. The Department in its Final Order may reject or modify the conclusions of law and interpretation of administrative rules in the Proposal for Decision, but may not reject or modify the findings of fact unless it first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence, or that the proceedings on which the findings were based did not comply with essential requirements of law. The Department has considered the exceptions and reviewed the record under these standards.

Generally the exceptions relate to Objectors' desire to have the Applicant meter and record any diversions, monitor the stream flows above Objectors' diversions, have the project inspected by a professional engineer, formally recognize Objectors' rights, and modify a cistern in the vicinity of the diversion works.

The record does not show the need for a measuring device at Applicant's point of diversion. The record shows there are downstream existing rights to which Applicant is legally subject to call, and that Applicant has the ability to control their diversion such that existing legal demands can be met. The record does not show how continuous flow monitoring by Applicant will help satisfy a criteria for issuance of a permit. Applicant has the ability to measure the water being diverted using a bucket and stopwatch, and may want to do so when starting diversion or a call is received. Although Applicant has no objection to measuring all water diverted and water pumped from the secondary point of diversion, the record does not show flow measurement are a necessary condition to show the criteria are satisfied.

Measuring flows downstream of Applicant to show existing downstream needs are met will not accomplish what downstream seniors desire. Junior appropriators need not let go by their point of diversion the maximum extent of downstream rights, but must let go by the amount of water needed to accomplish downstream senior purposes. See *Mettler v. Ames Realty*, 201 Pac. 704 (1921). The record shows Objector Shoal did not need stock water in January, 2002, and has always had water prior to 2000. Thus, the existing downstream demand varies from time to time. Only the downstream right holders know what their needs are and when their needs are not being met. Monitoring streamflow upstream of Objectors will not tell Applicant what Objectors' needs are, but rather only what is flowing in the stream. If more water is flowing in the stream than is needed or used at that time by downstream appropriators, even though it is less than the claimed rights downstream, then that excess water is available for appropriation by Applicant. Thus, the record does not show how stream measurement between Applicant and the downstream existing rights is necessary to show the criteria are met.

The record does not show why a compliance inspection by a professional engineer is needed. Applicant provided the Department with construction information in their application and testimony at hearing regarding how the project was built. Objector provided no

evidence that the means of diversion, construction, and operation were not adequate unless constructed under the auspices of a professional engineer. All Permittees are required to file a certified statement by a person experienced in design, construction, or operation of appropriation works, which includes but is not limited to engineers. Mont. Code Ann. § 85-2-315. Although Applicant has no objection to compliance inspection by a licensed engineer, the record does not show this is a necessary condition to show the criteria are satisfied.

Regarding recognition of existing rights, between appropriators, first in time is first in right, Mont Code Ann. § 85-2-401(1), and priority of permits issued by the Department is the date of filing an application according to Montana law. Mont Code Ann. § 85-2-401(2). The priority of the Objectors must be determined in accordance with Part 2 of Title 85, Chapter 2. Mont. Code Ann. § 85-2-401 (3). Therefore, all permits issued by the Department are by law issued subject to all prior rights in the source of supply. Further, they are issued subject to final determination of existing water rights, as provided by Montana law. Mont. Code Ann. § 85-2-313. Therefore, additional conditions are not necessary to acknowledge specific prior rights of Objectors.

The exception regarding modification of the second cistern (the one immediately downstream of the cistern used by this Applicant) to make it inoperable is not supported by the record. The record shows the lower cistern is not connected to the pipeline the subject of this application, and Applicant Weidling capped it. The record shows only that a former owner had problems with the lower cistern, so installed the upper cistern, from which Applicant (and Applicant Weidling) applied to divert water. The use and purpose of the lower cistern beyond the problems of the prior owner is not in the record, so requiring that it be physically abandoned is not supported by the record in this matter. However, the findings of fact do not describe which of the two cisterns is the subject of this Application. A review of the complete record shows the cistern used as the means of diversion by this Application is the upstream cistern of the two existing cisterns located at the description of the point of diversion

from Lerch Creek. Thus, Finding of Fact No.3, sentence 3 will be modified to "The water is to be diverted from the upstream cistern of two cisterns located in the SW¹/₄SE¹/₄SW¹/₄ of Section 14, Township 30 North, Range 20 West, Flathead County, Montana."

THEREFORE, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law of the Proposal for Decision in this matter with the modification made above, and incorporates them by reference.

Based on the record in this matter, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit is **ISSUED** to Ramona S. and William N. Nessly to appropriate 12 gallons per minute (gpm) up to 7.95 acre-feet of water per year from Lerch Creek. The water is to be diverted from the upstream cistern of two cisterns located in the SW¹/₄SE¹/₄SW¹/₄ of Section 14, Township 30 North, Range 20 West, Flathead County, Montana. The means of diversion is an existing cistern in the channel of Lerch Creek. The purposes are irrigation, and stock. The place of storage is a 0.08 surface acre pond with a capacity of 0.37 acre-feet in the SW¹/₄SW¹/₄SW¹/₄ of Section 14. The irrigation volume is 7.44 acre-feet; the irrigation place of use is 8.36 acres in the SW¹/₄SW¹/₄ of Section 14; the irrigation period of use is March 15 to October 14, inclusive, of each year. The stock volume is 0.51 acre-feet; the stock place of use is in the SW¹/₄SW¹/₄ of Section 14; the stock period of use is January 1 to December 31, inclusive, of each year. All places of use are in Section 14, Township 30 North, Range 20 West, Flathead County, Montana. The irrigation and stock uses will be diverted from the pond by a 12 gpm pump.

- A. Water may only be diverted during the months of May, June, July, August, and October of each year.
- B. Permittee shall line the pond with a plastic or other liner which prevents seepage from the bottom of the pond.
- C. Permittee shall return by pipe any excess water diverted to the pond back to the source above existing downstream users.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape or the oral proceedings to the district court.

Dated this 19th day of January, 2003.



Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Final Order was served upon all parties listed below on this 22nd day of January, 2003 by First Class United States Mail.

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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION FOR)	
BENEFICIAL WATER USE PERMIT NUMBER)	
76LJ-11583000 BY RAMONA S. AND)	PROPOSAL FOR DECISION
WILLIAM N. NESSLY)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307, a hearing was held on September 26, 2002, in Kalispell, Montana, to determine whether a beneficial water use permit should be issued to Ramona S. and William N. Nessly, hereinafter jointly referred to as "Applicant" for the above application under the criteria set forth in Mont. Code Ann. § 85-2-311.

APPEARANCES

Applicant appeared at the hearing by and through counsel, James H. Cossitt. Mark H. Paulson, Digital Design Works, testified for the Applicant.

Objectors Charles and Barbara Templeman appeared by and through counsel, Stephen C. Berg. Roger Noble, Hydrogeologist, Land & Water Consulting, and Charles (Fred) Templeman, testified for Objector Templeman.

Objector John Shoal appeared at the hearing and testified in his own behalf.

Judy Jeniker, Water Resources Specialist with the Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), was called to testify by the Hearing Examiner.

EXHIBITS

Both Applicant and Objectors offered exhibits for the record. The exhibits are admitted into the record to the extent noted below.

Applicant offered four exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibits 2, 3, 4, and 5. Applicant offered no other exhibits.

Applicant's Exhibit AN2 is a copy of two-page letter from Alice Hjermstad.

Applicant's Exhibit AN3 is a two-page copy of a warranty deed from Roy Smallwood to Alice I. Hjermstad.

Applicant's Exhibit AN4 is a two-page copy of an *Acknowledgement of Water Right Transfer* for Water right claim No. 76LJ-045124-00 dated 11/13/95.

Applicant's Exhibit AN5 is a two-page copy of an *Acknowledgement of Water Right Transfer* for Water right claim No. 76LJ-045124-00 dated 02/28/94.

Objector Templeman offered five exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector's Exhibits 1, 2, 4, 5, and 7. Objector Templeman offered no other exhibits.

Objector's Exhibit OT1 is a copy of a five-page technical memorandum with twenty-eight pages of maps, attachments, and photographs.

Objector's Exhibit OT2 is a one-page statement of Mr. Fred Templeman.

Objector's Exhibit OT3 consists of copies of four one-page letters between some of the Parties.

Objector's Exhibit OT4 is a two-page copy of an envelope and letter addressed to Mr. & Mrs. Ben Weidling.

Objector's Exhibit OT5 consists of copies of five pages of correspondence and a copy of a photograph.

Objector Shoal offered ten exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector's Exhibit 2, 3, 4, 6, 7, 8, 9, 10, 11, and 11B. Objector Shoal offered no other exhibits.

Objector's Exhibit OS2 is three pages of flow measurements.

Objector's Exhibit OS3 is a one-page statement of Mr. Tom Brown.

Objector's Exhibit OS4 consists of copies of May and June pages of a 2002 calendar.

Objector's Exhibit OS6 is a GPS location contained in Item No. 6 in Objector Shoal's Discovery Response Exhibit list.

Objector's Exhibit OS7 is a GPS location contained in Item No. 7 in Objector Shoal's Discovery Response Exhibit list.

Objector's Exhibit OS8 is a GPS location and statement contained in Item No. 8 in Objector Shoal's Discovery Response Exhibit list.

Objector's Exhibit OS9 is a three-page copy of a statement of R. E. Emerson.

Objector's Exhibit OS10 is a one-page copy of a letter.

Objector's Exhibit OS11 is a one-page map.

Objector's Exhibit OS11B is a one-page map.

PRELIMINARY MATTERS

The Parties stipulated that possessory interest in the place of use is not at issue in this hearing.

In a prehearing conference the Nessly and Weidling hearings were consolidated because portions of the evidence is identical for both applications. Evidence on the issues of physical availability, legal availability, and adverse affect, which is the same for all parties on both applications, was heard first. Then, evidence on the means of diversion, construction, and operation; and beneficial use was heard first for the Nessly application and followed by the Weidling application. Separate findings of fact, conclusions of law, and orders will be written for the Nessly and the Weidling applications.

At hearing Objector Templeman's questioning regarding Applicant's ownership at the point of diversion was ruled not relevant by the Hearing Examiner for the following reasons. Groundwater may only be appropriated by one who has a possessory interest in the property where the water is to be put to beneficial use and exclusive property rights in the groundwater development works or, if another person has rights in the groundwater development works, with the written consent of the person with those property rights. The Examiner heard Objector Templeman's evidence that the source is surface water. The Examiner concluded the Templeman questioning regarding an easement to the point of diversion did not pertain to exclusive property rights for groundwater appropriations but, instead, had to do with the right of access to the point of diversion for a surface water diversion. The right of access by way of an easement is not a criteria for issuance of a permit. See *In The Matter of Application For Change of Appropriation Water Right No. 76D-129039 by Keim & Krueger*, Final Order, (1989)

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

General

1. Application for Beneficial Water Use Permit 76LJ-11583000 in the name of Ramona S. and William N. Nessly and signed by Ramona S. and William N. Nessly was filed with the Department on May 23, 2001 at 12:15 PM. (Department file)
2. The Environmental Assessment (EA) prepared by the Department for these applications was reviewed and is included in the record of this proceeding.
3. Applicant seeks to appropriate 12 gallons per minute (gpm) up to 19.35 acre-feet of water per year from groundwater. The groundwater may also be known as Lerch Springs. The water is to be diverted at a

point in the SW¹/₄SE¹/₄SW¹/₄ of Section 14, Township 30 North, Range 20 West, Flathead County, Montana. The proposed means of diversion is an existing cistern in a developed spring. The proposed uses are fish and wildlife, irrigation, and stock. The proposed fish and wildlife volume is 19.35 acre-feet; the proposed fish and wildlife place of use is a 0.08 surface acre pond with a capacity of .37 acre-feet in the SW¹/₄SW¹/₄SW¹/₄ of Section 14; the proposed fish and wildlife period of use is January 1 to December 31, inclusive, of each year. The proposed irrigation volume is 10.20 acre-feet; the proposed irrigation place of use is 8.36 acres in the SW¹/₄SW¹/₄ of Section 14; the proposed irrigation period of use is March 15 to October 14, inclusive, of each year. The proposed stock volume is 0.51 acre-feet; the proposed stock place of use is in the SW¹/₄SW¹/₄ of Section 14; the proposed stock period of use is January 1 to December 31, inclusive, of each year. All places of use are in Section 14, Township 30 North, Range 20 West, Flathead County, Montana. The irrigation and stock uses will be diverted from the pond by a pump. (Department file)

4. Applicant claims the source is groundwater and base their claim on an investigation that shows flow rates increase in the stream channel below the point where the cisterns are located in the channel. Applicant's flow rates were determined based on synoptic measurements of the channel width, water depth, and water slope which were fed into a computer software program. Objector Templeman claims the source is surface water. Objector Templeman presented evidence showing synoptic channel flows do not increase below the Applicant's cisterns at the point of diversion. Objector's measurements were determined using a Marsh-McBirney flow meter which is state of the art technology. Here direct measurements of the channel width, depth, and slope oppose direct measurements of actual flow. The Examiner understands both methods are valid, but gives the greater weight to the method which directly measures the actual flow. In addition, there is no development of groundwater proposed here. This water may have originally been groundwater when the cisterns were installed. The

water being appropriated here is not water which was brought from below the ground surface by this project. Applicant's own evidence shows the immediate downstream flows decrease when the flows of 12 and 24 gpm are taken through the pipeline from the cistern to the ponds. If it is in fact groundwater brought to the surface, that development happened years ago when the cisterns were installed. It became surface water when it was allowed to flow from the cisterns down the surface channel over the years, and to be appropriated by downstream appropriators. (Department file, testimony of Mark Paulson, Roger Noble)

Physical Availability

5. Applicant measured flows from the source in the amounts of 12 and 24 gpm for the period of 48 hours to show water available in the amounts requested by Applicants Nessly and Weidling. During these tests Applicant found the water level in the cistern from which the water came did not decrease. Because the water level in the cistern did not drop, the flow requested is available in the source.

(Department file, testimony of Mark Paulson)

6. Applicant also used a methodology using channel width to show flows are available on an monthly basis outside the period the flow was measured. The mean monthly flows from this methodology are: October, 128.7 gpm; November, 87.1 gpm; December, 56.5 gpm; January, 33.6 gpm; February, 31.6 gpm; March, 34.7 gpm; April, 97.2 gpm; May, 170.4 gpm; June, 394.7 gpm; July, 311.7 gpm; August, 119 gpm; September, 88.7 gpm. This method may be questionable for this source because it does not use other basin characteristics including drainage basin area, relief, slope, mean precipitation, and mean elevation. Nonetheless, the 48 hour test and flow estimation method show water available during all months of the year in the amounts requested.

(Department file, testimony of Roger Noble, Mark Paulson)

Legal Availability

7. Applicant used Department records to determine existing demand on the source. Objector Shoal's stock use is listed at 0.31 gpm up to 1

acre-foot. Objector Templeman's rights are listed in the Department records at 90 gpm up to 73 acre-feet for domestic use and 90 gpm up to 146 acre-feet for stock use. There is also a claimed right listed in the Department records for 80 acres of irrigation at 1350 gpm up to 160 acre-feet to which Applicant Nessly and Applicant Weidling are partial successors. The total flow and volume of existing uses from Lerch Springs and Lerch Creek is 1530.31 gpm up to 380 acre-feet. Applicant knew Objector Templeman had a well for domestic use so concluded the Templeman domestic claimed right was not in use or never perfected as claimed. Applicant determined the amount of water claimed for the Templeman stock use was much beyond what the facilities on the Templeman property could carry, so concluded the rate and volume excessive, or never perfected as claimed. In addition, Applicant reviewed 1946, 1954, 1961, 1974, 1991, and 1994 aerial photographs of the area and found no evidence of a large domestic use or large stock use on the Templeman property. Applicant concluded Templeman's two claimed rights could not make a legal demand of any rate or volume from the source. Applicant then reviewed the claimed right of 1350 gpm up to 160 acre-feet from Lerch Springs for irrigation of 80 acres to which Applicant is a partial successor. Applicant determined that this right has not been used for over thirty years, that the 1350 gpm claimed flow rate is excessive based on the estimated mean monthly flows, and the 160 acre-feet volume is excessive based on the conclusion the historic land under irrigation was, at most, 13 $\frac{1}{2}$ acres. This information leads Applicant to conclude this right is no longer a right from which a demand or call will stem. Applicant then deducted only Mr. Shoal's claimed flow rate (0.31 gpm) from the lowest estimated mean monthly flow of 31.6 gpm to conclude the requested 12 gpm (and an additional 12 gpm for the Weidling Application) in the source is physically available and is not destined for a downstream appropriator. This analysis does not agree with the actual needs of the Objectors. (Department file, testimony of Mark Paulson)

8. Objector Shoal's actual need for instream stock use is 15-20 gpm. This is so even though Objector Shoal only filed a claim for 0.31 gpm for instream stock. Objector presented testimony his actual need and historic use is 15-20 gpm. (Department file, testimony of John Shoal)

9. Objector Templeman has claimed water rights for the use of Lerch Creek for domestic lawn sprinkler irrigation, and for a stockwater and fish pond. Objector Templeman amended his Claim for stockwater in September, 2002, by filing it with the Department. The amendment is to include the existing fish pond that has been there since the early 1970's. This claim amendment was disclosed to Applicant in *Templeman's Response to Discovery Order* served September 12, 2002 upon Applicant. Applicant appears to argue that the amendment was not proper and, therefore, the right to call the source for water for the fish pond does not exist. (Department file, testimony of Mark Paulson, Roger Noble)

10. The evidence in the record does not describe exactly how much water is actually needed for Objector Templeman's water uses. However, Objector Templeman described that he pumps or siphons water from the pond for irrigation and stock water, and that there have been fish in the pond. Objector Templeman's fish died as a result of no flows in the spring of 2001. When Objector Templeman was asked what flow was needed for his rights, 90 gpm or 180 gpm, he responded that he wished there was 90 gpm in the source. The record shows that the irrigation and stock use come from the pond storage and flow, and that 90 gpm would be sufficient for Objector Templeman's uses. (Department file, testimony of Charles Templeman)

11. The existing legal demand downstream of Applicant includes 15-20 gpm of Objector Shoal's and 90 gpm of Objector Templeman's for a total of 105-110 gpm. (Department file, testimony of Charles Templeman, John Shoal)

12. Flows in Lerch Creek during May through June 10, 2001 and 2002, ranged between zero and ten gpm. After June 10, flows increase to 100 gpm. The flow measurements were taken during a drought in the area.

Until the fall of 2000, the stream has not dried up in the past thirty-five years. (Department file, testimony of Charles Templeman, John Shoal)

13. During the time of Applicant's 48-hour test to show water physically available at 12 gpm (for the Nessly Application) there was a minor drop in flows below the cistern in the Lerch Creek channel. During the 48-hour test at 24 gpm (for both Nessly and Weidling Applications) the flow in Lerch Creek below the cistern dropped by one-third. The actual flow downstream of the cistern remaining available for downstream appropriators is not in the record.

(Department file, testimony of Mark Paulson)

14. The Objectors' stream flow measurements come during a drought the area is experiencing. Applicant's mean monthly flow estimations are representative of non-drought periods. Water beyond what is needed by Objector Shoal (15-20 gpm), Objector Templeman (90 gpm), and Applicant (12 gpm) for a total of 117-122 gpm is not available in September, November, December, January, February, March, and April according to Applicant's flow estimates. Estimated mean monthly flows in these months are less than 105-110 gpm and would use up all of the estimated flow to fill existing downstream legal demands and Applicant's request. (Department file, testimony of John Shoal, Charles Templeman)

Adverse Effect

15. There is a valve in the conveyance pipeline at the cistern at the point of diversion and a valve on the pipe at the point of discharge to the pond. Applicant's plan to prevent adverse affect is to use the valve to control or stop diversion rates when a valid call from a prior appropriator is received. (Department file)

Adequacy of Appropriation Works

16. Applicant has successfully diverted the requested flows of 12 gpm (and 24 gpm) through the diversion works at the requested flow rate. (Department file, testimony of Mark Paulson)

17. Applicant originally did not intend to line the pond. Instead, the intent was to divert only the flow rate which would seep through

the bottom of the pond. Thus, no pond overflow would occur requiring a means to convey the overflow back to the source across the property of others. (Department file, testimony of Mark Paulson)

Beneficial Use

18. Applicant intends to use a fish pond to enhance recreation, photography, and nature studies; attract wildlife and waterfowl; and be the centerpiece of Applicant's overall landscaping plans. Applicant requested the volume of water produced by 12 gpm flowing year round, 19.35 acre-feet, for the pond uses. (Department file, testimony of Mark Paulson)

19. Applicant explained that the stock volume, 0.51 acre-feet, and irrigation volume, 10.2 acre-feet, are secondary to the fishery and the volume for stock and irrigation would be taken out of the volume requested for the fishery. Applicant intends to stock the fish pond with 'coy' and 'goldfish'. Specific water needs for this fishery are not in the record. (Department file, testimony of Mark Paulson)

20. Applicant does not know what flow rate and volume are necessary for the fishery use. Applicant has the idea that the Department does not require a flow rate for turnover because the policy requiring such was rescinded, and relies only on the statutory definition of beneficial use which includes "fish and wildlife" to show the proposed fish and wildlife use is beneficial. Applicant's total requested flow rate (fishery, irrigation, stock) was determined from the flow rate which would infiltrate into the ground without surface runoff and not from the needs of any of the purposes. (Department file, testimony of Mark Paulson)

21. Applicant intends to water up to fifteen draft horses. Fifteen head of draft horses require up to 0.51 acre-feet of water annually. This is 133% of the volume required for regular sized horses and is reasonable. (Department file, testimony of Mark Paulson)

22. Applicant intends to irrigate 8.36 acres of fruit trees which are planted at twice as far apart as the normal spacing. Irrigation requirements for orchards in this area is 2.45 acre-feet per acre of

orchard. Applicant is requesting half this amount (1.22 acre-feet per acre) because of the increased spacing. The irrigation volume required for 8.36 acres of fruit trees at this spacing is 10.2 acre-feet.

(Department file, testimony of Mark Paulson)

23. Twelve gpm flowing March 15 through September 15 will only produce a volume of 9.55 acre-feet. The period of diversion intended is year round into a pond. The irrigation volume above 9.55 acre-feet could accumulate in the pond prior to March 15 and be available from pond storage except the storage volume is only 0.37 acre-feet. Thus, 9.55 acre-feet of direct flow at 12 gpm plus 0.37 acre-feet of stored water is the most that is available for a total of 9.92 acre-feet as requested in the application. The viability of the proposed fishery with this scenario is not in the record. (Department file, testimony of Mark Paulson)

Possessory Interest

24. Applicant is the owner of the property which has been designated in the Application as the place of use. (Department file)

Water Quality Issues

25. No objections relative to water quality were filed against this application nor were there any objections relative to water classification or to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. § 85-2-311 by a preponderance of the evidence. Mont. Code Ann. § 85-2-311(1).
2. A permit shall be issued if there is water physically available at the proposed point of diversion in the amount that the applicant

seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. § 85-2-311 (1) (a) through (h).

3. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, and in the amount requested. Mont. Code Ann. § 85-2-311(1)(a)(i). See Finding of Fact Nos. 5, 6.

4. The Applicant has proven that water can reasonably be considered legally available during May, June, July, August, and October except during periods of drought. Legal availability is determined by analysis of non-drought periods. See *In The Matter of Application 41B-074154 by Johnson*, Proposal for Decision, (1990). Using the Department records to determine existing legal demands on the source is merely a starting point. The actual needs of valid water rights are what is needed for Applicant to determine existing legal demands. Objector Shoal's actual needs are 15-20 gpm. Although smaller rights were claimed by Objector Shoal in the adjudication than his actual historic use as testified to in this proceeding, actual beneficial use is the basis, the measure and the limit of all rights, See *McDonald v. State*, 220 Mont. 519, 530, 722 P2d 598, 605 (1986), and Shoal may still have the opportunity in the adjudication to have his actual historic use

recognized. As the right is not finally decreed the opportunity remains to have the final decree reflect the actual historic use. In addition, Objector Shoal's use is for instream livestock which is exempt from the filing requirements of Mont. Code Ann. § 85-2-221(1). Mont. Code Ann. § 85-2-222. Although larger rights were claimed by Objector Templeman in the adjudication than his actual use, they are prima facie only in the adjudication, and are not binding in this proceeding. Mont. Code Ann. § 85-2-227(1). Objector Templeman's actual beneficial use is the basis, the measure and the limit of his rights. *Id.* at 530, 722 P2d at 605. Additionally, the claimed right to which Applicant is a co-successor is not in use and is properly not included in the existing demand determination. The Hearing Examiner calculates the legal downstream flow demand at 105 gpm ($15+90=105$). Thus, 117 gpm ($15+90+12=117$) is the flow which Applicant must show is available in the source to meet existing demands and his request. Applicant's flow estimation technique shows 117 gpm is exceeded in the months of May, June, July, August, and October of each year. Applicant, then, has proven that water is legally available in these months. Mont. Code Ann. § 85-2-311(1)(a)(ii). See Finding of Fact Nos. 7, 8, 9, 10, 12, 13, 14, 17.

5. The Applicant has proven that the water rights of prior appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected. Applicant plans to stop or control their use of water with a valve at the point of diversion so the rights of prior appropriators can be satisfied. Mont. Code Ann. § 85-2-311(1)(b). See Finding of Fact No 15.

6. The Applicant has not proven as proposed that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Although the diversion works are adequate, if the pond is not lined operation of the pond is not adequate. It will result in all water diverted to the pond, twelve gpm, seeping out the bottom. This a wasteful use of the water when alternatives exist that would prevent such loss and still accomplish the intended purpose. Waste is

defined in part as the unreasonable loss of water through the design or negligent operation of an appropriation facility. Mont. Code Ann. § 85-2-102 (18). At hearing Applicant stated they would line the pond and obtain an easement that would allow returning any overflow back to the source. The record does not show the route to return water to the source will not also seep. To accomplish undiminished flow return, the overflow would have to be piped back to the source. With the lining of the pond and piping, Applicant will have proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. §§ 85-2-311(1)(c), 312. See Finding of Fact Nos. 16, 17.

7. The Applicant has not proven by a preponderance of evidence that the quantity of water proposed to be used for fish and wildlife purposes is the minimum amount necessary for the proposed beneficial use. Applicant relies on the rescinded Department pond policy as justification to not show the amount of water necessary for this purpose. Rescinding a policy does not replace the burden an applicant has to show the proposed use is a beneficial use of water and the amount requested is justified. The Applicant has not provided evidence to establish a direct correlation between the amount of water requested and the need for that amount of water to sustain a fish pond to enhance recreation, photography, and nature studies; attract wildlife and waterfowl; and be the centerpiece of Applicant's overall landscaping plans. Nor has Applicant explained how the requested fishery can exist if virtually all the stored water in the pond is used for the irrigation and stock, and is taken out of the volume for the fishery purpose. The fishery purpose has not been justified as a beneficial use of water as proposed. Mont. Code Ann. § 85-2-311(1)(d). See Finding of Fact Nos. 18, 19, 20, 23.

8. The Applicant has proven the proposed use of water for irrigation, up to 10.2 acre-feet, is a beneficial use of water for which Applicant can establish a water right under a permit. However,

the amount available in a five month period is only 7.95 acre-feet¹ for the requested irrigation, stock, and storage. Mont. Code Ann. § 85-2-311(1)(d). See Finding of Fact No. 14, 18, 19, 22, 23.

9. The Applicant has proven the proposed use of 0.51 acre-feet of water for stock is a beneficial use of water for which Applicant can establish a water right under a permit. Mont. Code Ann. § 85-2-311(1)(d). See Finding of Fact Nos. 18, 19, 21

10. The Applicant has proven a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-311(1)(e). See, Finding of Fact No. 24

11. No objection was raised as to the issue of water quality of a prior appropriator being adversely affected, the proposed use not being in accordance with a classification of water, or as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Mont. Code Ann. § 85-2-311(1)(f), (g), (h). See, Finding of Fact No. 25.

12. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. There are conditions as set out below which will satisfy the criteria, including legal availability, beneficial use, and the adequacy of the means of diversion, construction, and operation of the appropriation works, and limitations necessary on the period of diversion and maximum volume allowed. Mont. Code Ann. § 85-2-312. See Conclusion of Law Nos. 4, 6, 8 above.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit is **ISSUED** to Ramona S. and William N. Nessly to appropriate 12 gallons per minute (gpm) up to

¹ $(12 \text{ g/m} \times 1440 \text{ m/d} \times 150 \text{ days}) / 325851 \text{ g/acre-foot} = 7.95 \text{ acre-feet}$
Proposal for Decision
Permit Application 76LJ-11583000 by Nessly

7.95 acre-feet of water per year from Lerch Creek. The water is to be diverted at a point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14, Township 30 North, Range 20 West, Flathead County, Montana. The means of diversion is an existing cistern in the channel of Lerch Creek. The purposes are irrigation, and stock. The place of storage is a 0.08 surface acre pond with a capacity of 0.37 acre-feet in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14. The irrigation volume is 7.44 acre-feet; the irrigation place of use is 8.36 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14; the irrigation period of use is March 15 to October 14, inclusive, of each year. The stock volume is 0.51 acre-feet; the stock place of use is in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14; the stock period of use is January 1 to December 31, inclusive, of each year. All places of use are in Section 14, Township 30 North, Range 20 West, Flathead County, Montana. The irrigation and stock uses will be diverted from the pond by a 12 gpm pump.

- A. Water may only be diverted during the months of May, June, July, August, and October of each year.
- B. Permittee shall line the pond with a plastic or other liner which prevents seepage from the bottom of the pond.
- C. Permittee shall return by pipe any excess water diverted to the pond back to the source above existing downstream users.

NOTICE

This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral argument. Exceptions and briefs, and requests for oral argument must be filed with the Department by November 19, 2002, or postmarked by the same date, and copies mailed by that same date to all parties.

Parties may file responses and response briefs to any exception filed by another party. The responses and response briefs must be filed with the Department by December 9, 2002, or postmarked by the

same date, and copies must be mailed by that same date to all parties.
No new evidence will be considered.

No final decision shall be made until after the expiration of the
above time periods, and due consideration of *timely* oral argument
requests, exceptions, responses, and briefs.

Dated this 30th day of October, 2002.



Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Proposal for Decision was served upon all parties listed below on this 30th day of October, 2002 by First Class United States Mail.

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